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SUPREME COURT, U. S.

No. 713

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

WILLIAM JOSEPH BREAULT and BONNIE JO ELLEN KATHRYN BREAULT,

Petitioners,

vs.

HAROLD L. FEIGENHOLTZ, as Executor and Trustee under the last will and testament of Oscar J. Breault, deceased, and individually; ESTELLE ANGELA BREAULT; KENNETH BREAULT; and WESLEY MEMORIAL HOSPITAL, a corporation,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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WILLIAM JOSEPH BREAULT and BONNIE JO ELLEN KATHRYN BREAULT,

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vs.

HAROLD L. FEIGENHOLTZ, as Executor and Trustee under the last will and testament of Oscar J. Breault, deceased, and individually; ESTELLE ANGELA BREAULT; KENNETH BREAULT; and WESLEY MEMORIAL HOSPITAL, a corporation,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

Statement.

The petition for a writ of certiorari seeks to draw in question the propriety of a decision of the Court of Appeals

for the Seventh Circuit affirming the dismissal for want of federal jurisdictional amount of a will contest in a diversity case, on the grounds, principally, that the court below misapprehended *St. Paul Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, and misread the oral and documentary evidence, which included 111 exhibits introduced by respondent.

Petitioners' petition for a rehearing and for a rehearing *en banc* was unanimously denied.

This occurred against a background of other unrelenting and generally unsuccessful litigation on their part that commenced seven years ago and shows no signs of exhaustion. *In Re Estate of Breault*, 29 Ill. (2) 165, 193 N.E. (2) 824 (1963); *In Re Estate of Breault*, 63 Ill. App. (2) 246, 211 N.E. (2) 424 (1965); *Breault* v. *Marovitz, Judge of the United States District Court*, mandamus, C.A. 7, No. 15155 (1965) unreported; *Breault* v. *Feigenholtz*, 250 F. Supp. 551 (1965), aff'd. 358 F. (2) 39 (1966), cert. den. 385 U.S. 824 (1966).

Their propensity is all the more amazing when it is considered that Oscar's estate is hopelessly insolvent, and that in *Breault* v. *Feigenholtz*, the courts told them that if Oscar's will were set aside, his mother's testamentary trust property, totaling over $400,000, would pass to the three charities named in her will as remaindermen; and that in that litigation, petitioners averred they were the owners of the equitable title to Oscar's estate, as well as the owners of his mother's trust assets, and they personally, not Oscar's estate, were entitled to the uninventoried accounting they here assert belongs to Oscar's estate.

The motive for their perseverance emerged parenthetically for the first time in par. 9 of their motion to vacate the District Court's dismissal order, wherein they stated that one of the three charities has since 358 F. (2) 39 (1966) assigned its interest to them. (App. 235).

While this purported assignment, if otherwise valid, could not enhance their statutory standing to maintain the will contest under Illinois law, *Selden* v. *Ill. T. & S. Bk.*, 239 Ill. 67, 75, 87 N.E. 860; Ill. Rev. Stat. 1965, ch. 3, sec. 90, it might give them as assignees one-third of the trust property, if they set Oscar's will aside.

Argument.

I.

The Rules of this Court, effective October 2, 1967, have not been complied with.

Petitioners have not filed within the time prescribed by law a transcript of the record of the proceedings in the District Court, certified by the clerk of that Court, as required by Rule 21 (1) (2) and Rule 22 (3). Former Rule 21 (3) does not appear in the new Rules. We introduced in evidence 111 exhibits, many of which are inadequately described in their appendix in one sentence each. Although they had ample time, they failed to apply for a stay of mandate, and refiled their will contest in the State Court, where it is now pending.

II.

The decision of the Court of Appeals was clearly correct.

The Factual Basis.

While the action was brought by two minor children in 1960, they attained their majorities during the pendency of the action in the District Court. (App. 230)

Their assertion that only one claim was filed against the probate estate (Pet. p. 2), is erroneous.

Twenty-seven claims of Oscar's creditors, aggregating $17,363.47 were paid with funds advanced by the trustees. One of these claims was for Oscar's income tax amounting to $12,539.67. (App. 105, 106). Instead of filing these claims separately, the trustees of the mother's trust, over which Oscar exercised his power of appointment by his will, filed their own claim for $17,363.47 within the time allowed by

law. (App. 105, 106). (Def's. Exhibits 41 to 63, 78 to 105, incl.; App. 114, 116, 117-120).

Ill. Rev. Stat. 1965, ch. 3, sec. 204 provides that all claims against an estate, except expenses of administration and surviving spouse's or child's awards, not filed within nine months from the issuance of letters testamentary, are barred as to the estate inventoried within that time.

Another claim filed by the trustees within the statutory time was for $20,000 and interest on a note and chattel mortgage dated January 5, 1959, on account of funds advanced Oscar to purchase a boat. (App. 102-104; Def's. Exhibits 31-37, incl., App. 113, 114). The note and mortgage had been marked cancelled after Oscar's death to facilitate the sale of the boat, but the proposed deals fell through, and the purported cancellation, being without consideration, was ineffective between the parties. (App. 172-174).

Petitioners attacked the executor's consent to the trustees' claims, 29 Ill. (2) 165, 171, but the State Supreme Court said "we see neither waste, wilfulness, nor bad faith". (p. 180)

There was a funeral expense claim for $893.75. (Def's. Exhibits 64, 106, App. 116, 118).

There was a claim of another law firm for $1000 for services rendered Oscar in his lifetime. (App. 171, Def's. Exhibit 67, App. 116).

There were other claims amounting to $637.89 (Def's. Exhibits 65, 66, 68, 69, 70, App. 116, 117), in addition to the foregoing, that were allowed by the Probate Court. Illinois law does not require notice to all parties of the hearing on claims. Interested parties, receiving notice of

the filing of the will for probate, are required to follow all proceedings, except those which the law specifies for notice.

The trustee advanced other large sums totalling $60,573.83 for administration expenses and taxes. (App. 117, 120, 124, 125, Def's. Exhibits 72, 73, 74, 75, 76, 77, 107, 108, 109, 109A).

Taxes accrue and are due as of the date of decedent's death. *Board* v. *Illinois,* 404 Ill. 193, 198, 88 N.E. (2) 489; *Nat. Safe Dep. Co.* v. *Stead,* 250 Ill. 584, 597, 95 N.E. 973.

Oscar's third wife received a widow's award of $4500. (App. 24). The widow's award is a preferred claim and a debt of the estate. *In Re Guttman's Estate,* 349 Ill. App. 58, 110 N.E. (2) 87, 89.

There was a tentative assessment of federal estate tax of some $39,000, made on the basis of the executor's figures. (App. 125, Def's. Exhibit 30, App. 113). We cannot discuss the later deficiency assessment, now in the Tax Court, because it is not in the record.

The fees of the executor, and his then counsel, Busch, to July 1, 1960, were estimated at $2500. (Appellee's App. 10).

On the other hand, Oscar left no cash, but only personal property of an estimated value of $25,705. (App. 23). The bill of appraisement approved by the Probate Court March 8, 1960, showed $26,880; but that included diamonds which belonged to the mother, and not Oscar. (Appellee's App. 28-30).

The estate's deficiencies exceeded $100,000.

Petitioners filed a claim for $5,605.02, which is pending. (App. 24).

Ann Jensen, Oscar's first wife, and Kenneth Breault, the adult son of that marriage, filed a claim for $21,125, and interest, which is pending. (App. 24).

On July 12, 1960, the Probate Court approved the executor's amended inventory which differentiated between Oscar's personal estate of $25,705, and the appointive trust property of $477,567.60. (App. 110-112).

In Re Estate of Breault, 29 Ill. (2) 165, 178, 193 N.E. (2) 824, (1963), the Illinois Supreme Court held that the appointive assets were not a part of Oscar's estate, and were not required to be inventoried there.

In Illinois, executors are not estopped by their inventories. *Damiani* v. *De Trana,* 206 Ill. App. 64, 68; *Tartt* v. *Wahl,* 77 Ill. App. 578. The approval of an inventory is not an adjudication of the right of property. *Simms* v. *Guess,* 52 Ill. App. 543, 546. The listing or improper listing of property, or failure to list it, in an inventory is not determinative of the title thereto, and does not affect the true title. *Ginocchia* v. *Frederick,* 153 N.E. (2) 476, 19 Ill. App. (2) 303 (abst.). Inventories are not admissible against the other defendants, *First Nat. Bk.* v. *McCarthy,* 334 Ill. App. 480, 493, 494, 82 N.E. (2) 496, or even against the executor when he is sued with others. *Joyal* v. *Pilotte,* 293 Ill. 377, 381, 127 N.E. 471; *cf.* Ill. Rev. Stat. 1965, ch. 3, sec. 177.

As to the claim for the accounting from the trustees for the period from January 1, 1959 to July 16, 1959, the trustees' fourth report and account was not disapproved by the State Supreme Court. That Court held only that the administrator to collect had no authority to approve it, and that such a claim should have been included in the executor's first account. *In Re Estate of Breault,* 29 Ill. (2) 165, 179, 193 N.E. (2) 824.

Had the claim been included in Oscar's estate for its full face amount, the estate would still be insolvent. However, the trustees' fourth account, received in evidence here, showed in detail the receipts and disbursements (App. 92-94).

Petitioners did not contradict it, although they were afforded access to records (App. 60); they took Feigenholtz's discovery deposition (App. 27); the trustees were available; and they had Feigenholtz, and his then attorney, Busch, on the witness stand for examination on the hearing on the motion to dismiss. (App. 121-177). A trustee is presumed to have acted in good faith and to have performed his duties. The burden of proving his breach of trust is upon the one asserting it. *First-Trust Joint Stock Bank* v. *Hickok,* 367 Ill. 144, 148, 10 N.E. (2) 646; *People* v. *Barrett,* 405 Ill. 188, 196, 90 N.E. (2) 94.

The Appellate Court of Illinois, in an opinion by Mr. Justice Kluczynski (now a justice of the Illinois Supreme Court) affirming the Probate Court's finding of insolvency with relation to Oscar's estate, noted that the trustees were claiming for that six month period $12,539.67 due them from Oscar's estate, besides advances and taxes paid by them, and their allowed claims. *In Re Estate of Breault,* 63 Ill. App. (2) 248, 262, 211 N.E. (2) 424 (1965).

It is a matter of wonderment that the hearing on the trustees' fourth report filed years ago has never been held.

Petitioners infer that the appointive property became part of Oscar's estate, contrary to the State Supreme Court decision, because they were referred to as equitable assets by the Appellate Court. The Appellate Court did not quite say that. It added "so far as his creditors are concerned".

It also referred to the appointive property as "nonprobate" property. (pp. 266, 267,268). We need not belabor this point because it was squarely passed upon in *United States* v. *Field*, 255 U.S. 257, 263, 264, where the Court said in regard to the same contention:

> "and whether the power be or be not exercised, the property that was subject to appointment is not subject to distribution as part of the estate of the donee."

With reference to their uninventoried accounting claim for $1,000,000, which is lacking in merit on its face, they had every opportunity to support it by evidence, but failed. After the late District Judge Miner, on November 13, 1961, remitted them to the state courts to obtain determinations in regard to the accounting, and the solvency of Oscar's estate (App. 178, 179), as to which order no review was sought, cf. *England* v. *Medical Examiners*, 375 U.S. 411, 413, footnote 2, they took the wrong route.

After the Illinois Supreme Court told them that the uninventoried accounting claim went "beyond the issues of the case and the jurisdiction of the probate court", 29 Ill. (2) 165, 180, they reversed their course abruptly and decided to claim the trust property and the accounting for themselves. *Breault* v. *Feigenholtz*, 358 F. (2) 39, 46, affm'g. 250 F. Supp. 551; cert. den. 385 U.S. 824.

When they secured the assignment from one of the charities after their defeat in 358 F.(2) 39, they changed their course again, and pressed for a determination of the will contest, claiming that Oscar's estate had the million dollar claim against the trustees, whose three reports and accounts for the period from the inception of the trust to the end of 1958 were approved in writing by him. (App. 71-92).

When District Judge Marovitz announced his decision to dismiss the will contest, petitioners neither then, nor in their motion to vacate, urged the necessity of a further evidentiary hearing. Nor did they do so unqualifiedly in the Court of Appeals.

Courts do not approve, especially in connection with the administration of probate estates, of the assumption of inconsistent positions and of oppressive and harrassing delays practiced by dissatisfied beneficiaries "for the self-serving purpose of solving the controversy they have created." *Breault* v. *Feigenholtz,* 358 F. (2) 39, 44 (1966).

The Appellate Court of Illinois said in effect they could not claim for themselves an accounting in the Federal Court, and claim in the State Court that the accounting belongs to Oscar's estate. *In Re Estate of Breault,* 63 Ill. App. (2) 246, 261, 211 N.E. (2) 424.

Two state courts and two federal courts have declared Oscar's estate insolvent. This Court has only recently said again that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Berenyi* v. *Immigration Service,* 385 U.S. 630, 635.

The Legal Basis.

28 U.S.C. sec. 1332 contains the words "sum or value". It has never been held by this Court that the words are synonymous or interchangeable.

"Sum" relates to an action for a money judgment or decree, or one sounding in damages. "Value" relates usually to an action for property or title thereto, or some question affecting its enjoyment or possession, and arises quite frequently in injunction proceedings. 21 C.J.S. p.

68, sec. 57; 30 A.L.R. (2) 616, annotation; 81 L. Ed. 190, annotation.

The prime question in a will contest is indicated in the words of the state statute:

> "An issue at law shall be made whether or not the instrument produced is the will of the testator." Ill. Rev. Stat. 1965, ch. 3, sec. 92.

The statute says further:

> "Matters not germane to the distinctive purpose of the proceeding shall not be introduced by joinder, counterclaim, or otherwise". Ill. Rev. Stat. 1965, ch. 3, Sec. 5.

The Court below interpreted this language on another occasion. *Strachan* v. *Nisbet*, 202 F. (2) 216, 219, C.A. 7.

"Sum" cannot be involved in such a proceeding. Petitioners recognized this when their complaint alleged:

> "If said instrument is found and held to be invalid, as herein prayed, plaintiffs, as heirs, will be entitled to money and property exceeding in value the amount devised and bequeathed to them under said instrument by more than $10,000 exclusive of interest and costs." (App. 6).

Incidentally, this is not an allegation that the claim of any single plaintiff exceeds the jurisdictional amount. *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, 589; *Pinel* v. *Pinel*, 240 U.S. 594, 597 (will case).

"Sum" cannot ordinarily be proved without a trial on the merits, and the Federal Courts are not in favor of two trials on the merits. Hence the area of jurisdictional attack is limited to the face of the complaint and good faith, in such a case. "Value", however, can be proved without a trial on the merits, as in the case at bar.

Even if under federal law, "value" could not be questioned preliminarily, its determination would still have to be made prior to the decision on the merits under the Illinois statute, which provides that only an "interested person" may file a will contest. Ill. Rev. Stat. 1965, ch. 3, sec. 90. That issue is jurisdictional, *Strachan* v. *Nisbet,* 202 F. (2) 216, 218, 219, C.A. 7, and was likewise raised by respondent here. (App. 187, 188)

An "interested person" means one who has been detrimentally deprived by a will in a pecuniary sense of property he would have otherwise had, in the absence of the will. One who is deprived of nothing by the will, but is thereby given benefits he otherwise could not have had, is not an "interested person", and cannot contest the will. *Selden* v. *Ill. T. & S. Bk.,* 239 Ill. 67, 79, 87 N.E. 860.

This Court has said that the plaintiff must prove it by "competent proof", and by "a preponderance of the evidence", and not by "mere averment", whenever jurisdictional "value" is challenged, or whenever it appears by suggestion of the parties, or otherwise, that jurisdiction in that respect is lacking. Even an appellate court must notice its absence. *McNutt* v. *General Motors,* 298 Ill. 178, 189; *Hague* v. *Committee,* 307 U.S. 496, 507; *KVOS* v. *Associated Press,* 299 U.S. 269, 278, 280; *Thompson* v. *Gaskill,* 315 U.S. 442, 446; *St. Paul Indemnity Co.* v. *Red Cab Co.,* 303 U.S. 283, 288, footnote 10; *cf.* Federal Rule 12 (h) (3). Mr. Justice Roberts, who delivered the opinion in St. Paul Indemnity, 303 U.S. 283, made the distinction clearly in *Hague,* 307 U.S. 496, 507.

The existence of such "value" is to be measured by that which the plaintiff seeks to gain by his action, its pecuniary consequence to him. *Seslar* v. *Local Union,* 186 F. (2) 403, 406, C.A. 7; cert. den. 341 U.S. 940; *Landers* v. *Vischer*

Products Co., 201 F. (2) 319, 329, C.A. 7; *Nord* v. *Griffin*, 86 F. (2) 481, 483, C.A. 7; cert. den. 300 U.S. 673. Also: *Selden* v. *Ill. T. & S. Bk.*, 239 Ill. 67, 79, 87 N.E. 860.

The Court said long ago that the test of "value" is "money value", and where that is involved, the matter in dispute must have a "known and certain value, which can be proved and calculated in the ordinary mode of a business transaction". *Barry* v. *Mercein*, 5 How. (46 U.S.) 103, 12 L.Ed. 70. Where that is involved, the subject matter must be presently measurable by some recognized pecuniary standard. Speculative anticipation will not support jurisdiction. *Vicksburgh etc. Co.* v. *Natten*, 58 F. (2) 979, 980, C.A. 5.

Overby v. *Gordon*, 177 U.S. 214, is not in point.

That was not a diversity case. Involved was a caveat objecting to the admission of a will to probate in a local District of Columbia court on the ground that the testator was domiciled in Georgia, where a will contest was one in rem. The only issue submitted to the jury was domicile. Therefore this Court decided it had jurisdiction of the caveators' appeal under the Act of 1893 because "the contention was advanced by virtue of a claim of common title in the next of kin of the decedent to the corpus of the estate, such title, if any, being derived from the law of the alleged domicile. In this aspect, the amount of the estate was the matter in dispute. *New Orleans etc. Co.* v. *Parker*, 143 U.S. 42, 51-52, and cases there cited". *Overby* v. *Gordon*, 177 U.S. 214, 218.

The New Orleans case pointed out the distinction between proceedings in rem and those inter partes. At pp. 221, 223, 227, of *Overby*, the Court made the same distinction, and held that under Georgia law, the proceeding was one in rem.

Additionally, *Overby* did not involve appointive property, which here does not pass as a part of Oscar's estate. *In Re Estate of Breault*, 29 Ill. (2) 165, 174, 178; 193 N.E. (2) 824.

In Illinois, a will contest is an independent proceeding inter partes, and is not a claim of common title. *McCreary* v. *Bartholf*, 305 Ill. 325, 327, 330, 137 N.E. 242; *Lewark* v. *Dodd*, 288 Ill. 80, 85, 123 N.E. 260; *Walker* v. *Cook*, 294 Ill. 294, 128 N.E. 584; *McGee* v. *Vandeventer*, 326 Ill. 425, 432, 433, 158 N.E. 127.

The fact the petitioners' claim may be derived from a single instrument, or they may have a community of interest, does not make it one of common title. *Pinel* v. *Pinel*, 240 U.S. 594, 596; *Thomas* v. *Gaskill*, 315 U.S. 442, 447.

Moreover, in view of the prior adjudications here that if Oscar's will were set aside, the mother's trust estate would pass to her three charities, the claim of common title to an insolvent estate would prove sterile.

The policy of the statute conferring diversity jurisdiction calls for its strict construction. *Thomson* v. *Gaskill*, 315 U.S. 442, 446.

Petitioners' hope in pressing the will contest now lies, not in what they will gain as Oscar's heirs, but in realizing on the assignment they obtained in 1966.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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